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No.

In the Supreme Court of the United States

October Term, 1983

ROBERT J. CREASON, d/b/a KANSAS CARTAGE COMPANY,
Petitioner,

vs.

MO-KAN TEAMSTERS PENSION FUND, a trust fund, and MO-KAN TEAMSTERS HEALTH & WELFARE FUND, a trust fund,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether under *Jim McNeff, Inc. v. Todd*, ... U.S. ....., 75 L.Ed.2d 830, 103 S. Ct. 1753 (1983), petitioner's liability on a "pre-hire" agreement terminated with petitioner's letter of January 24, 1977, to the Unions and the Funds repudiating the agreement.

2. Whether under *National Labor Relations Board v. Local Union No. 103, International Association of Bridge Structural and Ornamental Iron Workers, AFL-CIO, et al.*, 434 U.S. 335 (1978) (hereinafter referred to as *Higdon*), the burden of proof is on the trustees of the Health and Benefit Funds to show majority status of the Union as a prerequisite of enforcement of a "pre-hire" agreement.

3. Whether under the terms of *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), the contract was unenforceable because it was a prohibited "pre-hire" agreement under the labor laws.

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OPINIONS BELOW

The opinion of The United States Court of Appeals for the Tenth Circuit is unreported and is printed in Appendix A hereto, infra, page A1. The judgment of The United States Court of Appeals for the Tenth Circuit is printed in Appendix C hereto, infra, page A35. The Memorandum and Order of the United States District Court for the District of Kansas is unreported and is printed in Appendix B hereto, infra, page A13. The Judgment of The United States District Court for the District of Kansas is printed in Appendix D hereto, infra, page A36.

JURISDICTION

The judgment of The United States Court of Appeals for the Tenth Circuit (Appendix C, infra, page A35) was entered on the 6th day of September, 1983. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

29 U.S.C. § 158(a). It shall be unfair labor practice for any employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the right guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the be-

ginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 158(f). It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be

engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to subsection (a) (3) of this section: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to petition filed pursuant to section 159(c) of this title.

STATEMENT OF CASE

This is a civil action brought by the Mo-Kan Teamsters Pension Fund and the Mo-Kan Health and Welfare Fund against Robert J. Creason, d/b/a Kansas Cartage Company in The United States District Court for the District of Kansas. The case was tried in The United States

District Court for the District of Kansas. On April 16, 1981, the Court filed its Memorandum Decision and Order, finding for the Pension and Health and Welfare Fund. The defendant appealed to the Tenth Circuit Court of Appeals. In a Memorandum Decision filed on September 6, 1983, the Tenth Circuit affirmed the decision of the trial court.

The plaintiffs, Mo-Kan Teamsters Pension Fund and Mo-Kan Teamsters Health and Welfare Fund, were established in January 1970 and January 1971 respectively. They were created pursuant to a collective bargaining agreement entered into between the Builders' Association of Kansas City (hereinafter referred to as "Association"), and Local Union No. 541 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers (hereinafter referred to as "541").

The defendant, Robert J. Creason, d/b/a Kansas Cartage Company, is in the business of hauling materials and supplies to and from construction sites and plants where heavy equipment is used. Mr. Creason also does a considerable amount of millwright work and over-the-road hauling. He has operated about fifty (50) vehicles since 1971 throughout the United States.

The events that gave rise to this case occurred in March 1971. At that time, a picket was placed at defendant's plant by 541. The day the picket appeared, Mr. Creason called Karl Rogers, a union representative. Rogers told him that it was necessary for him to sign up to pay health and welfare benefits. Mr. Creason told Rogers that because he did millwright work and over-the-road work the agreements between the Association and 541 did not cover him. Rogers then informed Mr. Creason that he was only interested in the work being done for CECO at Crown Center because the builder for that project was a member

of the Association. Rogers told Mr. Creason that he would not bother the rest of his business if he would agree to pay into the funds for the CECO work. Rogers and Creason then agreed to meet at Rogers' office to discuss the matter.

Mr. Creason testified that he met with Karl Rogers and a third individual identified by Rogers as Karl Mayfield.

Rogers presented three copies of the agreement between the Association and 541 (hereinafter referred to as Master Agreement) to Mr. Creason. Mr. Creason told Rogers that he did not belong to the Association and that he did not want to sign the agreement. Rogers informed him that the union had to have something in writing to get the accounts started. Mr. Creason stated that he then signed two copies of the Master Agreement writing the words "under protest" with his name.

Mr. Creason took a third copy of the Master Agreement back to his office where he instructed his business manager, Jack Slaughter, to begin making payments to the funds on the CECO work as had been agreed. After the meeting the picket was removed. Mr. Creason paid into the funds exactly as he agreed to do from March 1971 to December 1976.

The plaintiffs' theory of the case was that at the March 15, 1971, meeting, Mr. Creason must have signed a stipulation agreeing to be bound by the Master Agreement between the Association and 541. Significantly, however, no witness for the plaintiffs testified that he saw Mr. Creason sign the stipulation. Indeed, Rogers had no recollection at all of the stipulation as late as December 28, 1977, when his deposition was taken. In addition, Rogers did not deny that the agreement of

March 15, 1971, was limited to coverage of the CECO workers. He made the carefully limited claim that he had "no memory" that the agreement applied only to deliveries on the CECO project at Crown Center. Rogers also admitted that the agreement was made because of the picket and that as soon as the agreement was struck, the picket was removed.

From March 1971 through September 1976, neither the union nor the trustees of the funds did anything to indicate that Mr. Creason was obligated to do more than pay for the work done on the CECO project. Over the five year period there was no challenge to the remittances Creason made although the company frequently remitted payments for only two or three employees and occasionally made no remittance. During this time, there was no evidence that the union monitored Creason's company to insure that the various requirements of the Master Agreement concerning pay, vacations, and working conditions were met. In fact, none of the witnesses recalled any contact between 541 and the company from March 1971 through September 1976.

During this time there was no evidence that the union ever achieved majority status except for Karl Rogers' statement that it did. No election was ever held and the union witnesses produced no cards to confirm majority status.

In a letter dated January 24, 1977, Mr. Creason notified the plaintiffs of his intent to terminate the Master Agreement then in effect. That letter was sent by Mr. Creason to Karl Rogers with copies to William Hunt and both the Pension and Welfare Funds informing them that neither Mr. Creason nor the company was ever a party to any collective bargaining agreement with 541 and that neither

Mr. Creason nor the company had signed a contract stipulation with Teamsters Local Union 541. Without admitting the validity of the allegations in the lawsuit, the letter stated that Creason and Kansas Cartage Company were thereby giving written notice of termination of the joint agreement between the Association and 541 which was then in effect until March 31, 1977. That agreement provided in Article XIV:

> This agreement, effective May 1, 1974, shall remain in full force and effect until March 31, 1977, and shall be automatically renewed from year to year thereafter unless opened by either party hereto for changes or termination by notice to the other party at least sixty (60) days prior to the expiration date.

Accordingly, the letter dated January 24, 1977, was served upon the union "at least sixty (60) days prior to the expiration date of March 31, 1977," and met the termination requirements of the language of that agreement. Moreover, Rogers, two (2) days thereafter by letter, notified the defendant that the union was reopening the 1974 through 1977 agreement for negotiations.

REASONS FOR GRANTING WRIT

I. Certiorari Should Be Granted to decide an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States.

One of the issues in this case is whether the letter sent by petitioner to the Funds on January 24, 1977, effectively terminated any obligation the petitioner may have had under the terms of the stipulation and collective bargaining agreement. The trial court found that the notice of termination given by the petitioner was not effective to terminate his obligation under said contract stipulation. In affirming the decision of the trial court, the Tenth Circuit in effect agreed. In *Jim McNeff, Inc. v. Todd*, ... U.S. ....., 75 L.Ed.2d 830, 103 S. Ct. 1753 (1983), the Supreme Court held that "the monetary obligations assumed by an employer under a pre-hire contract may be recovered in a § 301 action brought by a union prior to the repudiation of the contract, even though the union has not attained majority support in the relevant unit." The Court went on to point out, however, that a § 8(f) pre-hire agreement is subject to repudiation until the union establishes majority status. In Footnote 11 the Court stated:

> It is not necessary to decide in this case what specific acts would effect the repudiation of a pre-hire agreement—sending notice to the union, engaging in activity overtly and completely inconsistent with contractual obligations, or, as respondents suggest, precipitating a representation election pursuant to the final proviso in § (8)f that shows the union does not enjoy majority support.

Thus, it has not been resolved what kind of notice is required in order to terminate an obligation to a union that had not established majority status under § 8(f) prehire agreement. The question is one of national significance and this case offers an opportunity to the Supreme Court to resolve the question.

II. Certiorari Should Be Granted because federal questions have been decided in a way that conflicts with applicable decisions of this Court.

A

Section 8(f) of the National Labor Relations Act allows unions and employers to enter into collective bargaining agreements prior to a determination that the union has achieved majority status. That statute provides:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in § 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of § 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the em-

> ployer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area; provided, that nothing in this subsection shall set aside the final proviso to § 8(a) of this Act; provided further, that any agreement which would be invalid, but for clause (1) of this subsection shall not be a bar to a petition filed pursuant to § 9(c) or 9(e).

This is a general exception to the policy that "a union should not purport to act as the collective bargaining agent for all unit employees, and may not be recognized as such, unless it is the voice of the majority of employees in the unit." *Higdon*, 434 U.S. 335 (1978). The exception was made to accommodate the need of the construction industry for certainty regarding labor costs before making bids and regarding the availability of skilled labor.

Higdon establishes, however, that the exception was a narrow one. In that case, the construction company and a local iron workers union entered into what is referred to as a pre-hire agreement under which the company agreed to abide by the terms of a collective bargaining agreement entered into between the union and a multi-employer association. The sole stockholder in the company then formed a separate company for the purpose of circumventing the pre-hire agreement. When the union learned of this, it picketed two job sites of the new company. The union, however, never represented a majority

of the workers at either job site and it never petitioned for a representative election. After thirty days of picketing, Higdon filed an unfair labor practice petition charging that the union was violating § 8(b)(7) of the National Labor Relations Act by picketing more than thirty (30) days for recognition without filing a petition for an election. The union contended that the purpose of the picketing was not to obtain recognition but to secure compliance with the § 8(f) agreement. The Supreme Court ruled that a § 8(f) agreement is unenforceable until such time as the union achieves majority status.

It is clear that the agreement in this case between 541 and the Association is a § 8(f) contract. Rogers testified that the funds were established to accommodate the pay practices of the construction industry. The primary purpose of the agreements, according to Rogers, was to cover those involved in building, supplying, and delivering materials and equipment to construction sites. The jurisdiction of local teamsters unions was divided into the type of work performed. If the work was construction-related it came under the jurisdiction of 541. The Builders Association was made up of contractors, sub-contractors, and construction industry suppliers. The audit even recognized the fact that this was a construction agreement in that it used the wage rates set by the Construction Industry Stabilization Committee.

It is also clear that the union did not establish that they represented the majority of Mr. Creason's employees. Rogers testified that the union had a history of representing Mr. Creason's employees. He admitted that there had never been an election but he claimed that the employees had signed cards. He produced no cards, however, to support his point. All of the rest of the evidence indicated

that the union did not represent Mr. Creason's employees. Mr. Creason testified that all of his employees crossed the picket. The person who picketed had been employed by the company only two or three days. To Mr. Creason's knowledge, no employee ever made a claim for benefits from the Funds. Mr. Creason testified that he never discussed hours, wages, or working conditions with a union representative. Rogers admitted that the union received no complaints from Mr. Creason's employees. Although the Master Agreement covered a variety of labor matters including pay, working conditions, and vacations, Rogers conceded that the only thing the union ever did to enforce the contract was to bring this lawsuit. Rogers admitted that as union representative he did not know whether Mr. Creason had complied with the agreements.

The trial court placed the burden of proof on the employer to show by clear and convincing evidence that the union was not a majority union. Case law does not support the trial court's position, however. In *Higdon*, 434 U.S. at 352, the Supreme Court stated that "absent a showing that the union is the majority's chosen instrument, the contract is unenforceable." In cases following *Higdon*, the courts have likewise placed the burden of proof on the party asserting the validity of the contract. *Baton Rouge Building and Construction Trades Council, AFL-CIO v. E. C. Schafer Construction Company, Inc.*, 492 F. Supp. 534 (M.D. La. 1980), *modified*, 657 F.2d 806 (5th Cir. 1981). In this case the Court not only put the burden on the employer, but also it required the employer to prove the point by clear and convincing evidence.

B

In the alternative, if the trial court was correct in ruling that the defendant was not primarily engaged in the building and construction industry, the stipulation would be in violation of the general prohibition against pre-hire agreements. *See*, § 8(a)(1)(3), § 8(b)(1)(A)(2) and § 8(f) of the National Labor Relations Act. Accordingly, under *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), it would be unenforceable. In the *Kaiser* case, the U.S. Supreme Court ruled that if an agreement was illegal under the labor laws to order an employer to pay into benefit funds according to the agreement's terms would command unlawful conduct and would be impermissible in the federal courts.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

(Filed September 6, 1983)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 81-1671

MO-KAN TEAMSTERS PENSION FUND, a trust fund, and MO-KAN TEAMSTERS HEALTH & WELFARE FUND, a trust fund,
Plaintiffs-Appellees,

v.

ROBERT J. CREASON, d/b/a KANSAS CARTAGE COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 76-228-C2)

Susan Ellmaker of Gates & Clyde, Overland Park, Kansas for Defendant-Appellant.

Michael C. Arnold of Yonke, Shackelford & Arnold, P.C., Kansas City, Kansas (Albert J. Yonke with him on the brief; George A. Groneman, Kansas City, Kansas also on the brief), for Plaintiffs-Appellees.

Before BARRETT, McKAY, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

This is an action brought under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), and section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132 (1976 & Supp. V 1981). Defendant Robert J. Creason appeals from the district court's order awarding plaintiffs Mo-Kan Teamsters Pension Fund and Mo-Kan Teamsters Health and Welfare Fund (the Funds) delinquent fringe benefit contributions, with interest, audit costs, and attorney's fees. He alleges that the trial court erred in (1) finding that he executed a contract stipulation; (2) failing to find the stipulation unenforceable as a prehire agreement; (3) finding that his obligation did not terminate; (4) rejecting certain parol evidence; and (5) basing the measure of damages on the results of an audit submitted by plaintiffs. We affirm.

I.

EXECUTION OF CONTRACT STIPULATION

A. Factual Background

Creason owns and operates Kansas Cartage Company, a trucking firm. The plaintiff trust funds were established in 1969 pursuant to a collective bargaining agreement between the Builders' Association of Kansas City, Missouri (Builders' Association) and Local Union No. 541 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers (Union). Although Creason has never been a member of the Builders' Association, the Union placed a picket on Creason's business on March 14, 1971, to protest his refusal to make payments into the Funds. The next day Creason met with Karl Rogers, who

is the president and a business representative of the Union and a trustee of both Funds.

From this point the facts are hotly disputed. Plaintiffs' witnesses testified that Creason executed the following contract stipulation:

"TEAMSTERS LOCAL UNION 541
CONTRACT STIPULATION

"The undersigned employer acknowledging receipt of a copy of the Collective Bargaining Agreement presently in effect between the Builders' Association of Kansas City and Local Union 541, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, and after negotiation and a complete discussion of the facts and circumstances involved and desiring and intending to be bound by the prevailing wages and conditions in the area, hereby agrees with the Union to be bound by the terms of such collective bargaining agreement, subsequent collective bargaining agreements, all fringe benefit agreements, welfare and pension plan trusts, all rules and regulations adopted by the Trustees of the aforementioned Trusts, and all other legal agreements between the aforementioned parties and any renewals, modifications, or extensions thereof for the duration of all said agreements. This stipulation which expressly applies to each and every term of the above agreements, shall be valid and effective when approved by the union and the proper undersigned Board of Trustees and shall remain in effect until five years from this date and thereafter shall automatically renew itself for a three-year period and at regular three-year intervals thereafter, unless either the em-

> ployer or the union gives written notice of desire to terminate to the other party and to the association, no more than 90 days and no less than 60 days prior to any such three-year anniversary date. Dated at 3-15 71, this ..... day of ..... 19....."

Rec., vol. III, at 413. The stipulation was signed and dated by Karl Rogers. Creason allegedly also signed the document. He disputed this at trial, however, testifying, "[i]t appears to be my signature but I did not sign this document." Rec., vol. XI, at 322. He said that he did sign two copies of the Builders' Association collective bargaining agreement with the words "under protest," and took an unsigned copy back to his office. However, he failed to produce either of the allegedly signed copies of this agreement.

The Funds introduced considerable evidence controverting Creason's position. Rogers testified that there would have been no reason for Creason to sign the Builders' Association contract. Additionally, the Funds produced several other documents purportedly signed by Creason. Creason conceded that all but one of the signatures appeared to be his, but he would neither deny nor affirm them as his. He did, however, acknowledge one signature as his own, a notarized signature on a document from other litigation. He conceded that this authenticated signature "appear[ed] to be the same" as the others, including the disputed one on the stipulation. Rec., vol. XI, at 343.

The parties agree that Creason submitted monthly remittance reports and made payments to the Funds from March 1971 to December 1976. Their explanations differ, however. Creason's position is that the payments were

only for work done on the Crown Center project, in accordance with a purported oral agreement with Rogers. The Funds insist that he was bound by the contract stipulation to make payments for all covered workers, and they seek the delinquent amount.

B. Discussion

Creason contends the district court erred in finding that he executed the stipulation. Initially, we note that a district court's findings of fact may be overturned on appeal only if they are clearly erroneous. Fed. R. Civ. P. 52(a). "'When a case is tried to the district court, the resolution of conflicting evidence and the determination of credibility are matters particularly within the province of the trial judge who heard and observed the demeanor of the witnesses.'" *Equal Employment Opportunity Commission v. Central Kansas Medical Center*, 705 F.2d 1270, 1274 (10th Cir. 1983) (quoting *Dowell v. United States*, 553 F.2d 1233, 1235 (10th Cir. 1977)).

On appeal, Creason suggests that the trial court should not have considered the other signatures offered. He relies on a line of early Iowa cases discussed in *Cousin v. Cousin*, 192 F.2d 377 (8th Cir. 1951). *Cousin*, however, is limited to Iowa law, and is neither controlling nor persuasive. Rule 901(b)(3) of the Federal Rules of Evidence allows triers of fact to authenticate writings by comparing them with authenticated specimens. The trial court's use of plaintiffs' exhibits was entirely proper. *See generally* 5 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶¶ 901(b)(3)[02]-[03] (1982). Despite Creason's testimony to the contrary, there was sufficient evidence to conclude that he did in fact sign the stipulation. The court's finding is not clearly erroneous.

II.

PREHIRE AGREEMENT

Creason argues that the contract stipulation is unenforceable as a prehire agreement entered into without majority support for the Union. Such prehire agreements have been authorized only in the building and construction industry. National Labor Relations Act § 8(f), 29 U.S.C. § 158(f) (1976).

> "By authorizing so-called 'prehire' agreements . . ., § 8(f) . . . exempts construction industry employers and unions from the general rule precluding a union and an employer from signing 'a collective-bargaining agreement recognizing the union as the exclusive bargaining representative when in fact only a minority of the employees have authorized the union to represent their interests.' "

Jim McNeff, Inc. v. Todd, 103 S.Ct. 1753, 1756 (1983) (quoting *NLRB v. Local Union No. 103, International Association of Bridge, Structural & Ornamental Iron Workers (Higdon)*, 434 U.S. 335, 344 (1978)).

The district court found that Creason was not an employer in the building and construction industry, but it also found that the stipulation was not a prehire agreement. Rather, it held the stipulation to be "a contract in which defendant voluntarily recognized the desire of a majority of his current employees to be represented by Teamsters Local No. 541." Rec., vol II, at 227. The district court's finding that Creason voluntarily recognized the Union is not clearly erroneous. Consequently, "a presumption was created that a majority of the employees desired Union representation." *Arco Electric Co. v. NLRB*, 618 F.2d 698, 700 (10th Cir. 1980).

If Creason believed that the Union did not represent a majority of his employees, his proper recourse was before the NLRB. Lack of majority status can only be challenged in an unfair labor practice proceeding, over which the NLRB has exclusive jurisdiction. *New Mexico District Council of Carpenters v. Mayhew Co.*, 664 F.2d 215, 217 (10th Cir. 1981). It is not a valid defense to a section 301 action for enforcement of accrued contractual obligations. *Jim McNeff*, 103 S.Ct. at 1758-59; *Mayhew*, 664 F.2d at 219-20.

Creason argues that under certain circumstances an employer can assert the illegality of a promise as a defense to a section 301 action. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982). However, *Kaiser Steel* is not controlling in this case. Unlike the asserted lack of majority status raised here, the hot cargo clause involved in that case was clearly an illegal promise *as well as* an unfair labor practice. *See* National Labor Relations Act § 8(e), 29 U.S.C. § 158(e) (1976). The Court did not disturb "the general rule [that] federal courts do not have jurisdiction over activity which 'is arguably subject to § 7 or § 8 of the [NLRA],' and they 'must defer to the exclusive competence of the National Labor Relations Board.'" *Kaiser Steel*, 455 U.S. at 83 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959)). The Court's unanimous decision in *Jim McNeff* makes clear that lack of majority status may not be asserted as a defense in a section 301 enforcement action.

III.

TERMINATION OF OBLIGATION

Creason contends that his obligation under the stipulation terminated upon expiration of the Builders' Association collective bargaining agreement in effect at the time

of the stipulation. The stipulation by its terms binds Creason to "all other legal agreements between [the Union and the Builders' Association] and any renewals, modifications, or extensions thereof for the duration of all said agreements." Rec., vol. III, at 413. Creason argues that his obligation terminated March 31, 1974, because the collective bargaining agreement expired at that time and a new one did not become effective until May 1, 1974.

Creason also asserts that the trial court erred in holding that a letter sent by his attorneys to the Union and the Funds on January 24, 1977, did not terminate his obligation. The letter stated:

> "[T]o the extent anyone believes that Robert J. Creason or Kansas Cartage Company is bound to the Joint Agreement between the Builders Association of Kansas City, Missouri, and Local Union No. 541, pursuant to Article XIV of the Joint Agreement presently in effect, please be advised that Mr. Creason and Kansas Cartage Company hereby give written notice of the Joint Agreement which is presently in effect until March 31, 1977."

Rec., supp. vol. I, at 5. The district court noted that the attempted termination would have been timely had Creason been a party to the agreement between the Builders' Association and the Union. It was not timely under the terms of the contract stipulation, however, which required notice of termination no more than ninety days and no less than sixty days prior to the anniversary dates in March 1976 and March 1979. Consequently, the district court held that Creason continued to be bound by the contract stipulation.

Creason argues that it is unfair to require him to decide over a year in advance of the expiration of the

collective bargaining agreement whether to renew his participation, citing *Seymour v. Coughlin Co.*, 609 F.2d 346, 350 (9th Cir. 1979), *cert. denied*, 446 U.S. 957 (1980). In *Seymour*, the employer had executed a "short form" contract which substantially incorporated the terms of an agreement between a multi-employer bargaining unit and a union. The short form stated that it was effective for the term of the master agreement "and for any renewals or extensions thereof," but said nothing about modifications. *See id.* The trial court held that the employer was not bound by a subsequent, modified master agreement, even though the employer had continued to make payments. The Ninth Circuit declined to reverse the trial court's interpretation and findings.

The Ninth Circuit later made clear that no per se rule was announced in *Seymour*. *See Construction Teamsters Health & Welfare Trust v. Con Form Construction Corp.*, 657 F.2d 1101, 1103 (9th Cir. 1981). *Con Form* involved a short form contract which, like the contract stipulation here, bound the employer to a master agreement and modifications thereof. The court stated "[i]t is clear that a signatory to a Short Form Agreement can agree to be bound by future modifications, extensions and renewals of [a Master Labor Agreement]." *Id.* at 1103. In upholding the trial court's determination that the employer continued to be bound, the Ninth Circuit noted that "[a]dditionally we find Con Form's conduct in continuing to pay the pension trust through December of 1977 and in sending a letter of termination in April of 1978, further evidences the parties intent to be bound by subsequent MLAs unless written notice of termination was given." *Id.* at 1104.

We find *Con Form* persuasive in refuting both Creason's claim that his obligation terminated when the col-

lective bargaining agreement lapsed in March 1974 and his claim that holding him to the termination provision of the contract stipulation would be unfair. Because Creason continued to make payments until December 1976, thus ratifying the new agreement, we need not address whether the thirty-day lapse in 1974 prevented the May 1 agreement from being a renewal, modification, or extension of the earlier agreement. We likewise decline to reverse the district court's view of the contract stipulation's termination clause.

IV.

PAROL EVIDENCE

According to Creason, Rogers had assured him at the March 15 meeting that "he would not bother the rest of our operation if we would agree to pay into the health and welfare fund on the Ceco . . . work at the Crown Center [construction site]." Rec., vol. XI, at 318. Rogers denied making such a promise.

Creason urges that the district court should not have rejected his evidence of oral representations by Rogers. He suggests the parol evidence should have been admitted to show that the contract was voidable due to mistake of fact. He argues that his testimony about Rogers assuring him he would only have to pay for employees involved with the Crown Center project is supported by the fact that "the *only* thing done pursuant to the master agreement was that money was paid into the funds on some of the employees." Brief for Appellant at 30.

A recent Ninth Circuit case is directly on point, and is dispositive of this contention. In *Waggoner v. Dallaire*, 648 F.2d 1362 (9th Cir. 1981), the employer testified that a union business agent "promised not to enforce the terms

of the agreement if [the employer] signed the 'short form' and agreed to adhere to the contract until he had finished the 'Thibado job,' a large construction project [the employer] was then undertaking." *Id.* at 1365. The district court held that the agreement was null and void because of fraud in the inducement. Discussing "the elaborate protection section 302 [of the LMRA, 29 U.S.C. § 186 (1976)] provides trust beneficiaries," *id.* at 1366, the Ninth Circuit reversed, holding "that an employer and a union may not orally modify the terms of employee trust provisions in a collective bargaining agreement." *Id.* (citing *Lewis v. Seanor Coal Co.*, 382 F.2d 437, 441-44 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968)); *accord Maxwell v. Lucky Construction Co.*, 113 L.R.R.M. (BNA) 3497 (9th Cir. July 19, 1983). We agree with the reasoning in *Waggoner*. *See also Manning v. Wiscombe*, 498 F.2d 1311 (10th Cir. 1974).

V.

MEASURE OF DAMAGES

The district court based damages on the results of an audit performed by an accountant from the Greater Kansas City Joint Construction Fringe Benefit Audit Program. Creason argues that the audit contained several significant errors and that the court's awards of damages were thus not supported by sufficient evidence.

The collective bargaining agreement required employers to pay a certain amount to each Fund for each hour a covered employee worked. Because Creason's business records had been stolen shortly before notice of the audit, records of hours worked were unavailable. The auditor therefore estimated hours worked by dividing gross wages (obtained from government records) by the hourly wage for pickup truck drivers. Creason argues that this method was inappropriate because his employees were paid

on a percentage basis rather than an hourly wage. Additionally, he notes that the rate for pickup truck drivers was lower than other rates and that use of a lower rate would inflate hours. The trial court addressed these concerns reasonably, imposing awards in amounts five percent lower than those calculated by the auditor, rather than imposing the expense of a new audit on defendant.

Creason next argues that two employees should not have been included in the audit because they were supervisors. Yet Creason himself testified that these employees also performed covered work (deliveries, mechanic work) as well as some supervision. The record contains substantial evidence to support the conclusion that they were covered. Creason also contends that his employees performed work outside the geographical jurisdiction of the agreement, but he presented no evidence from which that fact could be determined. Finally, he suggests that the audit included the work of employees who performed millwright work (installing equipment), which is not covered by the agreement. However, the auditor testified that she did not include millwrights, office workers, yard maintenance workers, and ground maintenance workers, based on Creason's answers to interrogatories about his employees' duties.

"When the cause and existence of damages have been established with the requisite certainty, recovery will not be denied because the amount of such damage is difficult of ascertainment. A reasonable basis for computation and the best evidence available under the circumstances is sufficient." *Thompson v. Kerr-McGee Refining Corp.*, 660 F.2d 1380, 1388 (10th Cir. 1981). The district court did not err in using the results of the audit to assess damages.

We have considered Creason's other contentions and find them unpersuasive. Accordingly, the judgment is affirmed.

APPENDIX B

(Filed April 16, 1981)

IN THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS

CIVIL ACTION
No. 76-228-C2

MO-KAN TEAMSTERS PENSION FUND, et al.,
Plaintiffs,

v.

ROBERT J. CREASON, d/b/a KANSAS
CARTAGE COMPANY,
Defendants.

MEMORANDUM AND ORDER

The above action came on regularly for trial to the court January 14, 1981. Plaintiffs appeared by their attorneys Albert J. Yonke, Michael C. Arnold, and George A. Groneman, and defendant appeared in person and by his attorney, William Haynes. Testimony and evidence having been offered by both parties, the court makes the following findings of fact and conclusions of law. Evidentiary objections raised by the parties at trial are overruled unless specifically addressed in this memorandum.

Findings of Fact

1. This court has jurisdiction over the parties and proper venue of the action is within this district.

2. This court has subject-matter jurisdiction by virtue of §301 of the National Labor Relations Act, 29 U.S.C. §185(a), and §502 of the Employee Retirement Income Security Act, 29 U.S.C. §1132.

3. Plaintiff Mo-Kan Teamsters Pension Fund (Pension Fund) is a trust fund existing and established pursuant to the Labor Management Relations Act, as amended, §302, 29 U.S.C. §186; said Pension Fund is an employee benefit plan within the meaning of §2 of the Employee Retirement Income Security Act, 29 U.S.C. §1002.

4. Plaintiff Pension Fund was established on October 13, 1969, pursuant to the collective bargaining agreement entered into between the Builders' Association of Kansas City, Missouri (Builders' Association), and Local Union No. 541 affiliated with the International Brotherhood of Teamsters (Teamsters Local No. 541); the situs of said Pension Fund is the City of Kansas City, Missouri.

5. Plaintiff Mo-Kan Teamsters Health and Welfare Fund (Health and Welfare Fund) is a trust fund existing and established pursuant to the Labor Management Relations Act, as amended, §302, 29 U.S.C. §186; said Health and Welfare Fund is an employee benefit plan with the meaning of §2 of the Employee Retirement Income Security Act, 29 U.S.C. §1002.

6. Plaintiff Health and Welfare Fund was established on October 13, 1969, pursuant to the collective bargaining agreement between the Builders' Association and Teamsters Local No. 541; the situs of said Health and Welfare Fund is the City of Kansas City, Missouri.

7. Defendant Robert J. Creason d/b/a Kansas Cartage Company, at all times material herein is and was an individual doing business in the states of Missouri and Kansas as well as other states; defendant is and was en-

gaged in the trucking or cartage business with employees driving over-the-road and performing millwright work.

8. In the ordinary course of business defendant Robert Creason annually engages in a substantial dollar volume of business with persons, firms, and corporations that are engaged in businesses affecting commerce within the meaning of the National Labor Relations Act, as amended, 29 U.S.C. §151 and 29 U.S.C. §185.

9. Defendant Robert J. Creason executed a contract stipulation on March 15, 1971, with Teamsters Local No. 541.

10. The contract stipulation provided, among other things, that defendant would be bound by the terms of a collective bargaining agreement then in effect between the Builders' Association and Teamsters Local No. 541.

11. Defendant has never been a member of the Builders' Association.

12. The contract stipulation provided that defendant would be bound by all subsequent collective bargaining agreements, fringe benefit agreements, welfare and pension fund trusts, rules and regulations adopted by the trustees of such trusts, and all other legal agreements between the Builders' Association and Teamsters Local No. 541, and any renewals, modifications or extensions thereof, for the duration of said agreements.

13. The contract stipulation provided that it would remain in effect until five years from the date of its execution, and automatically renew itself for a three-year period and at regular three-year intervals thereafter unless either defendant or union gave written notice of a desire to terminate to the other party and to the Builders' Association no more than ninety days and no less than sixty days prior to such three-year anniversary date.

14. The collective bargaining agreement referred to in the contract stipulation, as well as subsequent collective bargaining agreements between the Builders' Association and Teamsters Local No. 541, provide for payment to fringe benefit trust funds.

15. Through the contract stipulation, defendant Creason agreed under the terms of the collective bargaining and trust agreements, among other things, to pay and contribute to each of the plaintiff funds various sums per hour for each employee covered by and subject to said agreements during the period of March 15, 1971, to date.

16. Under the terms of the collective bargaining and trust agreements, defendant agreed to submit to the funds within ten days of the end of the proceeding month written reports containing the hours teamster employees worked during the preceding month, and listing the names and hours worked as well as amounts contributed for each such employee of defendant.

17. Defendant signed the Teamsters Local No. 541 contract stipulation voluntarily and not under duress.

18. The Teamsters Local No. 541 contract stipulation was not invalidated by oral representations of plaintiffs' agents.

19. Defendant is not an employer "engaged primarily in the building and construction industry" as contemplated under §8(f) of the Labor Management Relations Act, 29 U.S.C. §158(f).

20. The Teamsters Local No. 541 contract stipulation signed by defendant is not voidable as a prehire agreement.

21. Defendant has not produced clear, cogent and convincing evidence that the union was in the minority

among the unit of defendant's employees covered by the contract stipulation.

22. In a letter of January 24, 1977, addressed to Karl Rogers, President and Business Representative of Teamsters Local No. 541 and a trustee for plaintiff funds, defendant gave "written notice of termination of the Joint Agreement which is presently in effect until March 31, 1977."

23. A collective bargaining agreement was in effect between the Builders' Association and Teamsters Local No. 541 from May 1, 1974, until March 31, 1977. Because defendant was not a member of the Builders' Association, he was not a party to said labor agreement.

24. Defendant was bound to the terms of the collective bargaining agreement between the Builders' Association and Teamsters Local No. 541 by the contract stipulation signed May 15, 1971. The notice of termination given by defendant in the letter of January 24, 1977, was not effective to terminate defendant's obligation under said contract stipulation.

Discussion and Conclusions of Law

This court has jurisdiction over this action pursuant to §301 of the National Labor Relations Act, 29 U.S.C. §185(a), and §502 of the Employee Retirement Income Security Act, 29 U.S.C. §1132. Defendant's contention that the court lacks subject matter jurisdiction because the parties were required to settle their disputes in arbitration is without merit for the following reasons. First, claims that the Union, Teamsters Local No. 541, inflicted injury upon defendant cannot be raised as defenses against plaintiff trust funds. Because the union is not a party to this action, these defenses are improperly asserted in

this case. Second, the trust agreements authorize the trustees to bring this type of action to collect payments due from an employer. Third, the trust agreements do not specifically provide for the arbitration of claims for unpaid contributions to funds, but instead only provide for arbitration when the trustees are "deadlocked on any appropriate matter submitted for their concurrence." *Lewis v. Benedict Co.*, 361 U.S. 459, 468-71 (1960); *Todd v. Casemakers, Inc.*, 425 F.Supp. 1375, 1377-78 (N.D. Ill. 1977); *Wishnick v. One Stop Food & Liquor Store, Inc.*, 359 F.Supp. 239, 242-43 (N.D. Ill. 1973).

At trial defendant refused to acknowledge that his signature appeared on the Teamsters Local No. 541 contract stipulation. During cross-examination, plaintiff introduced numerous documents purporting to contain defendant's signature, but the defendant refused to verify the authenticity of the signatures. Among the documents introduced by plaintiff were: an authorization to assign and transfer defendant's initiation fees and dues to Teamsters Local No. 541; letters from Kansas Cartage to a Kansas City, Kansas, attorney concerning a case involving employees of Kansas Cartage Company; answers to interrogatories directed to Kansas Cartage Company in a case pending in the District Court of Wyandotte County, Kansas; and a final draft of the Central States Area Over-The-Road Motor Freight Agreement, 1955 Contract Negotiations. As plaintiffs introduced these and other exhibits, defendant either denied that they were his signatures, or stated that he had no recollection of signing the documents. The signature appearing on Teamsters Local No. 541 contract stipulation appears to be identical to those appearing on the documents submitted by plaintiff. The only evidence offered to challenge these signatures was Creason's oral testimony that he did not remember signing them. We

conclude from the evidence taken as a whole that the disputed signature on the stipulation is that of the defendant. *Huge v. Overly*, 445 F.Supp. 946, 948-49 (W.D. Pa. 1978).

In March 1971, defendant met with Karl Rogers, President and Business Representative of Teamsters Local No. 541 and a trustee for the funds. Defendant testified at trial that during this meeting defendant signed a copy of the collective bargaining agreement then in effect between the Builders' Association and Teamsters Local No. 541, but did not sign the Teamsters Local 541 contract stipulation. Defendant stated that he objected to the agreement because he was not a member of the Builders' Association and wrote "under protest" above the signature line to disassociate himself from the Builders' Association. Mr. Rogers testified that after searching the records of the union and the trust funds he could not find a copy of any agreement with the words "under protest" written above defendant's signature. Nor did defendant produce a copy of such an agreement. Defendant's oral testimony is not sufficient to overcome the terms of the written contract stipulation, which contains defendant's signature but not the words "under protest." Even if such documentation could be shown, defendant's objection to membership in the Builders' Association did not prevent him from agreeing to be bound by the collective bargaining agreement reached between the Builders' Association and Teamsters Local No. 541.

Defendant contends that he signed the Teamsters Local No. 541 contract stipulation under duress because a picket had been placed on his place of business, carrying a sign indicating the picket represented Teamsters Local No. 541. This allegation is no defense in this action by the trust funds. The National Labor Relations Board has

exclusive jurisdiction over activity arguably subject to §8 of the National Labor Relations Act, 29 U.S.C. §158. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Allegations concerning picketing involved basic conduct and relief covered by the National Labor Relations Act. Such claims are properly brought against the union before the National Labor Relations Board. *Lewis v. Young & Perkins Co.*, 190 F.Supp. 838, 841 (W.D. Ken. 1960).

Defendant argues that at their meeting in March, 1971, Mr. Rogers orally agreed that the contract would apply only to deliveries made by defendant to CeCo Steel at the Crown Center construction site. Defendant testified at trial that Teamsters Local No. 541 placed the picket on his business in March 1971. Although he did nothing the first day of picketing, the second day defendant contacted Mr. Rogers. Defendant testified that Rogers said the Union would stop picketing if defendant signed a contract and complied with its terms for employees delivering to CeCo Steel at the Crown Center site. Defendant testified that he signed a contract relying upon this agreement.

Parol evidence is not admissible to vary the terms of a written collective bargaining agreement, *Lewis v. Owens*, 338 F.2d 740, 742 (6th Cir. 1964); *Lewis v. Lowry*, 322 F.2d 453, 455 (4th Cir. 1963); *Lewis v. Mearns*, 168 F.Supp. 134, 138 (N.D.W.V. 1958), *aff'd* 268 F.2d 427 (4th Cir. 1959); *Local 509, Missouri-Kansas-Nebraska-Oklahoma District Council, I.L.G.W.U. v. Annshire Garment Co., Inc.*, No. KC-2307, 65 LRRM 2769 (D. Kan. June 30, 1967); *Lewis v. Young & Perkins Co.*, 190 F.Supp. 838, 841 (W.D. Ken. 1960), and this would include the written contract stipulation between defendant and teamsters Local No. 541.

Defendant contributed to plaintiff funds between 1971 and 1977. Although he did not fully comply with all the requirements, defendant adopted the contract stipulation by acting, even partially, under its terms. Challenges to the enforceability of a contract because of misrepresentations by union representatives must be made promptly by defendant. Here defendant contributed to the funds without challenging the enforceability of the contract stipulation until after this lawsuit was filed. This challenge comes too late. *Lewis v. Owens*, 338 F.2d at 742; *Lewis v. Lowry*, 322 F.2d at 456; *Lewis v. Mearns*, 168 F.Supp. at 138-39; *Audit Services, Inc. v. Stewart and Jones*, No. 80-123, slip op. at 11-13 (Mon. Sp. Ct., filed January 21, 1981), *summarized in 49 U.S.L.W. 2715*. Under accepted contract law defendant was bound by the terms of the standard contract stipulation that he signed. *Huge v. Overly*, 445 F.Supp. at 947.

Defendant argues that the contract is voidable because it was an agreement under §8(f) of the National Labor Relations Act, as amended, 29 U.S.C. §158(f), and the union did not represent a majority of his employees. Defendant testified that his employees hauled material to construction sites but did not unload the material at the sites. He also testified that his employes did some millwright work. Section 8(f) was added to the National Labor Relations Act to permit otherwise unlawful prehire agreements between unions and employers in the building and construction industry. Because of the nature of this industry, such prehire agreements were permitted (1) to enable an employer to know his labor costs before bidding and (2) to assure a ready supply of skilled craftsmen. S. Re. No. 187, H. Rep. No. 741, and Conf. Rep. No. 1147, 86th Cong., 1st Sess. (1959), 1959 U.S. Code Cong. & Ad. News 2344-45, 2441-43, and 2513. The concept

of "building and construction industry" envelops the combining of materials and constituent parts on a building site to form, make or build a structure. *Carpet, Linoleum & Soft Tile Local U. of No. 1247*, 156 NLRB No. 97 (Jan. 19, 1966), 1966 CCH NLRB ¶20,160. We find that defendant was not an employer in the building and construction industry because his employees were not primarily engaged in on-site construction work. *NLRB v. Irvin*, 475 F.2d 1265, 1267 (3rd Cir. 1973). In addition, we find that Teamsters Local Union No. 541's contract stipulation was not a prehire agreement, but was instead a contract in which defendant voluntarily recognized the desire of a majority of his current employees to be represented by Teamsters Local No. 541. *Audit Services, Inc. v. Stewart and Jones*, No. 80-123, slip op. at 4-7 (Mon. Sp. Ct., filed January 12, 1981), *summarized in* 49 U.S.L.W. 2725.

Although we hold that the contract stipulation was not a §8(f) prehire agreement, we feel compelled to address defendant's claim that the agreement was not valid under *NLRB v. Local Union No. 103, International Association of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335 (1978). In that case the union and employer had signed a §8(f) prehire agreement. When the employer failed to comply with the terms of the agreement, the union began picketing and continued for more than thirty days without filing a petition for an election with the National Labor Relations Board. The Supreme Court held that "[p]icketing to enforce the §8(f) contract was the legal equivalent of picketing to require recognition as the exclusive agent, and §8(b)(7)(C) was infringed when the union failed to request an election within thirty days." *Id.* at 346. The instant case is clearly distinguishable. Although defendant alleges picketing by Local Union No. 541, this picketing did not continue more than thirty

days without the filing of a petition in violation of §8(b)(7)(C). Defendant testified that the picketing lasted only two days. No evidence suggests that the picketing violated any provision of the National Labor Relations Act. In addition, the agreement between defendant and Local Union No. 541 was not a §8(f) prehire agreement. Therefore, the Supreme Court case relied on by defendant is clearly inapposite.

Defendant argues that the contract is unenforceable because the union has not established representation of a majority of the employees. Defendant, by voluntarily signing the contract stipulation, joined a collective bargaining agreement recognizing Local 541 as the bargaining representative for his employees. *Audit Services, Inc. v. Stewart and Jones*, No. 80-123, slip op. at 7-11 (Mon. Sp. Ct., filed January 12, 1981), *summarized in* 49 U.S.L.W. 2725. Although the union's majority status has not been established by Board certification, defendant is bound by a rebuttable presumption that the union continues to represent a majority of his employes. *E.g., NLRB v. Crimptex, Inc.*, 517 F.2d 5012, 503 (1st Cir. 1975). The defendant could have rebutted the presumption either by presenting "clear, cogent, and convincing evidence, that the union was in the minority," or by showing that the defendant "had a good faith reasonable doubt of majority support . . . ." *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 297 (9th Cir. 1978) (footnotes omitted), *cert. den.* 442 U.S. 921, *reh. den.* 444 U.S. 887 (1979). *Sahara-Tahoe Corporation v. NLRB*, 581 F.2d 767, 770-71 (9th Cir. 1978), *cert. den.* 441 U.S. 917, *reh. den.* 444 U.S. 888 (1979); *NLRB v. Crimptex, Inc.*, 517 F.2d 501, 503 (1st Cir. 1975). This presumption continued even after an employer withdraws from the collective bargaining agreement. *Tahoe Nugget, Inc.*, 584 F.2d at 302-03; *Sahara-Tahoe Corporation*, 581

F.2d at 770. Defendant's evidence does not show that the union was in the minority or that he had a good faith reasonable doubt of majority support at the time he withdrew from the collective bargaining agreement and failed to comply with its terms. Consequently, he has not rebutted the presumption of the continuing majority status of the union.

Defendant argues that his obligations under any agreement with Teamsters Local No. 541 ended with his termination letter of January 24, 1977. Although this letter would have been effective to terminate an employer from the collective bargaining agreement effective between the Builders' Association and Teamsters Local No. 541, defendant was not a party to that agreement since he was not and had never been a member of the Builders' Association. To effectively terminate his obligations under the Teamsters Local No. 541 contract stipulation, defendant must have complied with the termination requirements given in that contract. Further, termination had to occur between December 15, 1975, and January 15, 1976. Since defendant did not effectively terminate the agreement under the provisions of the contract stipulation, it continued in effect for another three years. The record contains no indication that notice of termination was given during the next period in which defendant could have effectively terminated his obligations. Therefore, we conclude that defendant continues to be obligated under Teamsters Local No. 541 contract stipulation.

Damages

Defendant made partial payments to plaintiff funds from 1971 to 1977. In a letter of September 24, 1976, plaintiffs notified defendant that a field audit would be conducted "for the purpose of determining the proper and

accurate payment of fringe contributions to the various participating fringe funds." (Plaintiffs' Exhibit 32.) According to defendant's testimony, one week prior to notice of plaintiffs' intended audit, on September 17, 1976, defendant's place of business was burglarized. Unfortunately for plaintiffs and the court, the burglar absconded with three guns, some related equipment, and all of the defendants' employment records relating to the time period covered by the Teamsters Local No. 541 contract stipulation. After this incident defendant was unable to provide plaintiffs with any assistance in conducting their audit. In spite of this misfortune, plaintiffs obtained the W-2 records for defendant's employees during the time in question and completed an audit. Using the calculations of this audit, plaintiffs determined the damages requested in this action.

Contributions to plaintiffs are based upon the number of hours worked by employes covered by the fund. To calculate the number of hours worked by each employee, the auditor obtained the gross wages of the employees from their W-2 reports and divided these wages by set hourly amounts. Defendant criticizes these calculations and the audit in general for several reasons.

First, defendant argues that his employees, who were covered by Teamsters Local No. 541, were paid on a percentage basis instead of an hourly wage, and therefore calculations on an hourly rate are inaccurate. Defendant also argues that the hourly rate used was lower than the hourly rate appropriated for the positions held by his employees. Using a lower hourly rate inflated the number of hours worked by defendant's employees. Multiplying the increased hours by the hourly contribution rate inflated amounts due plaintiff funds. The auditor testified that she used the hourly rate of a pickup truck driver to

calculate the hours, and did not determine the hourly rate set by the collective bargaining agreement. The auditor testified that she was instructed by her employer, James Duvall, to use the pickup truck driver rate. Mr. Duvall, who is a trustee and secretary of plaintiff Pension Fund and a trustee of plaintiff Health and Welfare Fund, testified that when records were lost it was customary to use the pickup truck driver rate as a typical wage rate. Plaintiffs argue in their post-trial brief that use of the lower rate would increase the hours worked by a *"very minimal amount."* (Emphasis in original.) In addition, plaintiffs note that defendant has not presented the court with alternative calculations using different rates. Although defendant's argument of inflated hours is well taken, the court also recognizes plaintiffs' plight of calculating the number of hours with only minimal records and a total lack of cooperation on the part of defendant.

Defendant further criticizes the audit because it includes hours of supervisors who would not be covered by plaintiff funds. The auditor testified that she was told which job classifications to include in the audit. (Plaintiffs' Exhibit 68.) She then conducted the audit using the list of employees and job classifications provided in defendant's answer to plaintiffs' Interrogatory No. 5 (Plaintiffs' Exhibit 27). Once again defendant has failed to provide the court with alternative calculations, setting out the names of employes in question and the amounts disputed.

Plaintiffs have presented extensive evidence to support their audit. Defendant's first criticism is without merit because payment on a percentage basis does not prohibit a reasonable determination of the number of hours worked. Defendant's second criticism, that a low hourly rate inflated the number of hours worked by his employes and in turn increased the total contributions due plaintiffs, merits con-

sideration. In their post-trial brief, plaintiffs discuss the error resulting from the use of the pickup truck driver rate rather than the steel truck driver or mechanic rate. Plaintiffs point out that use of the steel truck driver rate rather than the pickup truck driver rate as the denominator reduces the total hours between .8% and 1.3%. The total dollar contribution is correspondingly reduced between .8% and 1.3%. Similarly, plaintiffs note that use of the mechanic rate rather than the pickup truck driver rate reduces the total number of hours, as well as the resulting total dollars of contribution, by 3.4% to 5%.

We are concerned about the use of a low hourly rate which inflates the total number of hours worked. We are also, however, concerned about the expense to conduct a complete new audit. Such an expense cannot be justified in this case. Instead, under these circumstances, we believe it appropriate to use the mechanic rate listed by plaintiffs to reduce the total number of hours and the total dollar contribution by 5%. Although this decreases the recovery sought by plaintiffs, the reduction is warranted because of plaintiffs' incorrect use of the lower hourly rate in their audit calculations. Although the use of this rate may slightly increase the total contributions that would be due if another audit were conducted, any increase would be insignificant compared with the cost of a complete reaudit, which would be chargeable to defendant. Therefore, after balancing the interests of the parties, we apply the higher mechanic rate and find that defendant owes plaintiff Pension Fund $49,517.21 in contributions, and plaintiff Health and Welfare Fund $27,997.00 in contributions.

Defendant further criticizes the hourly rate used by plaintiffs because it was set by the Wage Stabilization Board rather than the Builders' Association contract. Plain-

tiffs in their post-trial brief argue that the rates set by the Wage Stabilization Board were the "rates actually paid and were the correct rates paid in accordance with the changes in the labor contracts." Defendant has not produced anything to contradict the use of rates set by the Wage Stabilization Board. Therefore, the court will accept the wages set out in plaintiffs' post-trial brief as the appropriate wages.

In addition, defendant further criticizes the audit because plaintiffs' calculations did not consider the location of defendant's employees during the performance of their work. Defendant points out that the collective bargaining agreement applicable in this case required the work to be performed in specific counties covered by the terms of the collective bargaining agreement. Defendant, however, has introduced no evidence upon which to determine the counties in which the employees performed their work.

Therefore, we find the calculations reached above to be an appropriate award of damages in this case.

Liquidated Damages and Cost of the Audit

Plaintiffs also contend that they are entitled to liquidated damages. Although liquidated damages are appropriate in these types of actions, *United States v. Carter*, 353 U.S. 210 (1957), we must determine if the agreement providing for such damages is enforceable. As stated in Section 339 of the Second Restatement of Contracts,

> An Agreement, made in advance of breach, fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless

(a) The amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and

(b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation.

If the agreement provides for an unreasonable sum, then it is unenforceable as a penalty. Several courts have found liquidated damages of 10% of amounts found to be owing to Pension and Health and Welfare Funds to be enforceable. *United States v. Carter*, 353 U.S. at 214, 220-21; *United Order of American Bricklayers & Stonemasons Union No. 21 v. Thorleif Larsen and Son, Inc.*, 519 F.2d 331 (7th Cir. 1975).

In analyzing damages that could be anticipated by Pension and Health and Welfare Funds the Seventh Circuit included "the loss of the benefits of the use of the Funds, increased administrative costs resulting from collection efforts, the difficulties the trustees would have in forecasting receipts, and possible loss of benefits to employees." 519 F.2d at 333. The court found liquidated damages computed on a percentage basis could be proportionate to the size of the contribution owed by defendant to the funds, even though they did not increase relative to the length of the delay in payment. Use of a percentage could be directly related to the amount of the delayed payments and thus not totally inflexible. *Id.* at 333-335. The court enforced a charge of 10% of the amount due to plaintiff Funds as liquidated damages.

The auditor in the instant case testified that she calculated liquidated damages between March 1971 and March 1977 by determining 25% of the amount defendant owed. Liquidated damages subsequent to March 1977 were cal-

culated by a different formula. Mr. Rogers testified that liquidated damages of 25% of the amount due was used prior to the adoption by the Board of Trustees of a resolution concerning liquidated damages effective in March 1977. The trust agreements of both Pension and Health and Welfare Funds provided for liquidated damages in the following manner:

> The Trustees shall have authority to demand, collect, receive and hold employer payments and may take such steps, including institution and prosecution of, or intervention in, any proceeding at law or in equity as may be necessary or desirable to effectuate collection of payments. In addition to the payments due, an employer may, in the discretion of the Trustees, be compelled to pay an additional amount as and for reasonable attorneys' fees and court costs incurred to enforce payments from any employer in default. *It is agreed that in case an employer is in default of any payments that the Board of Trustees in its discretion may, in order to effectuate the purposes of the Trust, impose such further costs and/or assessments upon said employer as it feels warranted under the particular circumstances.* (Emphasis added.)
>
> Agreement & Declaration of Trust of Mo-Kan Teamsters Pension Fund, dated October 13, 1961, effective January 1, 1970, Article VIII, §3 (Plaintiffs' Exhibit 8); Agreement & Declaration of Trust of Mo-Kan Teamsters Health and Welfare Fund, dated October 13, 1969, effective January 1, 1970, Article VIII, §3 (Plaintiffs' Exhibit 12).

These agreements were amended to contain the following provision applicable when an employer has defaulted in payments to the funds.:

> [T]he Trustees may, in their discretion, impose, assess and receive from such delinquent Employer liquidated damages in an amount or percentage of the delinquent contributions to be determined and fixed by the Trustees annually and based upon the above facts. In addition to the contributions due and the liquidated damages, the Employer, in the discretion of the Trustees, may be compelled to pay an additional amount as and for interest, reasonable attorneys' fees, court costs, audit costs and all other costs incurred to enforce payments from an Employer in default.
>
> Amended Agreement & Declaration of Trust of Mo-Kan Teamsters Pension Fund, dated September 23, 1976, effective January 1, 1976, Article VIII, §6 (Plaintiffs Exhibit 9); Amended Agreement & Declaration of Trust of Mo-Kan Teamsters Health and Welfare Fund, dated February 7, 1977, effective January 1, 1976, Article VII, §6 (Plaintiff's Exhibit 13).

Plaintiffs have not introduced any written provision or agreement of liquidated damages in the amount of 25% of the contributions due.

The resolution to be effective March 1, 1977, provides for liquidated damages as follows:

> When reports or contributions are received more than thirty (30) days after the end of the calendar month in which the hours were worked, the employer shall pay and the Trustees collect as liquidated damages a minimum of $50.00 or 10%, whichever is greater, of each delinquent monthly contribution. Thereafter, an additional 1% per month shall be imposed on such delinquent monthly contribution up to a maximum of 20% of each delinquent monthly contribution.

> If such monthly contribution remains unpaid for one (1) year, thereafter, in addition to the liquidated damages as aforesaid, the employer shall pay interest at the rate of eight (8%) percent per year after the first year of delinquency.
>
> The cost of the first payroll audit shall be paid by the employer if the audit discloses additional contributions to be due exceeding contributions actually paid by the employer by 10% or more during the period covered by the audit. The employer shall pay the cost of the second and any subsequent audits disclosing additional contributions to be due exceeding contributions actually paid by the employer by 5% or more during the period covered by the audit. Such limitations on the collection of audit costs for the first and subsequent audits shall not apply in the event suit is instituted. In the event suit is instituted, the employer shall pay the entire cost of the audit.
>
> The reasonable cost of audits is determined to be $22.00 per hour to be charged on the basis of the hours or parts thereof actually expended by the auditors in making such audit.

This provides for liquidated damages of up to 20% of the delinquent amount, interest of 8% a year on the delinquent amount after the first year of delinquency, and the cost of the audit to calculate liquidated damages. Defendant will be required to pay interest of 8% a year on the delinquent amount after the first year of delinquency. In addition, defendant will be charged with the cost of the audit. The auditor testified that the audit took 251 3/4 hours to complete. Plaintiffs were charged $22.00 per hour for the audit, a rate approved by the Trustees of the funds. Thus,

the total cost of the audit in the amount of $5,538.50 will be charged to the defendant.

Under the circumstances in this case, and particularly in view of allowances for cost of the audit and interest as well as attorneys' fees as discussed below, we believe that a further allowance for liquidated damages would be unreasonable.

Attorneys' Fees

Plaintiffs have requested reasonable attorneys' fees in this action. The provisions of the trust agreements quoted above providing for liquidated damages also provide for reasonable attorneys' fees and court costs incurred to enforce the default payments. In a summary of the hours and services provided through November 17, 1980, plaintiffs' counsel request payment for 171 hours of service at the rate of $40.00 per hour, resulting in a total of $6,840.00. In addition, expenses in the amount of $498.31 are sought. (Plaintiffs' Exhibit 64.) We find these requests to be reasonable.

Conclusion

Accordingly, we hold that defendant is bound by the contract stipulation he signed with Teamsters Local No. 541; that defendant owes Plaintiff Pension Fund $49,517.21 in contributions and Plaintiff Health and Welfare Fund $27,997.00 in contributions; that plaintiffs are not entitled to liquidated damages; that defendant is required to pay 8% interest a year on the delinquent amount after the first year of delinquency; that defendant is required to pay the cost of the audit in the amount of $5,538.50; and defendant is required to pay plaintiffs' counsel the sum of $6,840.00 for services, plus expenses in the amount of $498.31.

Plaintiffs' counsel shall prepare, circulate and submit for the court's approval an appropriate journal entry of judgment in accordance with the foregoing findings of fact and conclusions of law.

IT IS SO ORDERED.

Dated this 16 day of April, 1981, at Kansas City, Kansas.

Earl E. O'Connor
United States District Judge

APPENDIX C

(Filed September 30, 1983)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JULY TERM - September 6, 1983
Before Honorable James E. Barrett, Honorable Monroe G. McKay, and Honorable Stephanie K. Seymour, Circuit Judges

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No. 81-1671
(D.C. No. 76-228-C2)

MO-KAN TEAMSTERS PENSION FUND, a trust fund, and MO-KAN TEAMSTERS HEALTH & WELFARE FUND, a trust fund,
Plaintiffs-Appellees,

v.

ROBERT J. CREASON, d/b/a KANSAS CARTAGE COMPANY,
Defendant-Appellant.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

APPENDIX D

(Filed May 29, 1981)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 76-228-C2

MO-KAN TEAMSTERS PENSION FUND, et al.,
Plaintiffs,

-v-

ROBERT J. CREASON, d/b/a KANSAS CARTAGE COMPANY,
Defendants.

JUDGMENT ON DECISION BY THE COURT

This action came on for trial before the Court, the Honorable Earl E. O'Connor, United States District Judge, presiding, and the issues having been duly tried and a decision by Memorandum and Order of the Court with Findings of Fact and Conclusions of Law having been duly rendered and filed April 16, 1981,

IT IS ORDERED AND ADJUDGED:

That the plaintiff, Mo-Kan Teamsters Pension Fund recover of the defendant $49,517.21 as and for fringe benefit contributions; $22,470.69 as and for interest computed at 8% per year after the first year of delinquency; $2,769.25 as and for audit costs; $3,420.00 as and for reasonable attorney fees; and $249.16 as and for expenses of litigation.

That the plaintiff, Mo-Kan Teamsters Health and Welfare Fund recover of the defendant $27,997.00 as and for fringe benefit contributions; $12,652.02 as and for interest computed at 8% per year after the first year of delinquency; $2,769.25 as and for audit costs; $3,420.00 as and for reasonable attorney fees; and $249.15 as and for expenses of litigation.

Dated at Kansas City, Kansas this 29th day of May, 1981.

/s/ Earl E. O'Connor
Judge